Petition

81-1437

Office - Supreme Court, U.S.
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JAN 29 1982
ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

October Term, 1981

NORTHERN STATES POWER COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Whether, for highway use tax purposes, utility trucks equipped with specified pintle hooks are, as a matter of law, classifiable as "truck-trailer" combinations, rather than as "single unit" vehicles, irrespective of whether trailers are customarily used in connection with trucks of the type in question.

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The petitioner, Northern States Power Company, respectfully pravs that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit which affirmed the decision of the United States District Court for the District of Minnesota that, for purposes of Section 4481 of the Internal Revenue Code of 1954, as amended, 26 U.S.C., Section 4481, utility trucks equipped with specified pintle hooks are, as a matter of law, classifiable as "truck-trailer" combinations, rather than as "single unit" vehicles.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 663 F.2d 55 (8th Cir. 1981), 81-2 USTC ¶16,375 and 48 AFTR 2d ¶198,407. The opinion is set out in Appendix A, *infra*.

The opinion of the United States District Court for the District of Minnesota affirmed by the United States Court of Appeals for the Eighth Circuit is reported at 503 F. Supp. 1182 (D. Minn. 1981), 81-1 USTC ¶16,355 and 47 AFTR 2d 81-1657. The opinion is set out in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 4, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C., Section 1254(1).

STATUTES, REGULATIONS AND RULINGS INVOLVED

The statutes, regulations and revenue rulings involved are:

26 U.S.C., Sections 4481 and 4482.

Treasury Regulations on Highway Motor Vehicle Tax (26 C.F.R.), Sections 41.4482(a)-1 and 41.4482(b)-1.

Revenue Rulings 57-547, 1957-2 C.B. 789, and 76-294, 1976-2 C.B. 364.

The text of these statutes, regulations and revenue rulings are set out in Appendixes C, D and E, *infra*, respectively.

STATEMENT OF THE CASE

This suit seeks the refund of highway use taxes totaling $108,231 paid by the plaintiff, Northern States Power Company, for the period from July 1, 1972 through June 30, 1978. The District Court's jurisdiction was invoked pursuant to 28 U.S.C., Section 1346(a)(1). The essential facts are as follows:

Plaintiff is an operating public utility engaged in the generation, transmission, and distribution of electricity throughout a 40,000 square mile service area in several states, and the distribution of gas to 78 communities within this area. During the period in question, plaintiff owned and operated some 500 trucks which it used in constructing, servicing and repairing its utility system. The unloaded weights of these trucks varied between 6,000 and 21,000 pounds, but over 95 percent had unloaded weights of less than 13,000 pounds.

In determining and reporting its highway use tax liabilities under the provisions of Section 4481 of the Internal Revenue Code of 1954 ("Code"), the plaintiff classified its trucks as "single unit" vehicles, rather than as "truck-trailer" combinations, because they were not of the types of truck customarily used by the utility industry to tow trailers having two or more axles or one-axled trailers having a gross weight of 6,000 pounds or more. Almost all of plaintiff's trucks, however, were equipped with pintle hooks (a coupling device) capable of towing trailers with gross weights in excess of 6,000 pounds. During the period in question, plaintiff owned and operated some 500 trailers, of which approximately 54 percent were one-axled trailers having a gross weight of 5,999 pounds or less.

Without consideration of whether trucks of the type in question were customarily used in combination with trailers hav-

ing two or more axles or one-axled trailers weighing 6,000 pounds or more, the Internal Revenue Service assessed deficiencies of highway use tax against plaintiff on the ground that the presence of the pintle hooks alone required that the trucks be taxed as "truck-trailer" combinations, rather than as "single unit" vehicles. The preponderance of these deficiencies in tax resulted solely because plaintiff's trucks weighing between 9,000 and 13,000 pounds are subject to tax when classified as "truck-trailer" combinations, but are not subject to tax when classified as "single unit" vehicles.

Following institution of the instant action, the Government moved for summary judgment on the ground that the presence of the pintle hook on plaintiff's trucks, without more, required that they be taxed as "truck-trailer" combinations, rather than "single unit" vehicles, in accordance with the use tax schedule set forth in Treasury Regulations, §41.4482(b)-1(d). The District Court granted the Government's motion for summary judgment, and the Court of Appeals affirmed.

As noted in the District Court's opinion, the District Court for the Northern District of California has also considered this question and likewise granted summary judgment for the Government. *Pacific Gas and Electric Co. v. United States*, No. C-79-0596-WWS (N.D. Cal. 1980). The District Court's unreported decision is set out in Appendix F, *infra*. On appeal, however, the United States Court of Appeals for the Ninth Circuit reversed this decision and remanded for a factual determination as to whether trailers and/or semitrailers are customarily used in connection with highway motor vehicles of the same type operated by Pacific Gas and Electric. *Pacific Gas and Electric Co. v. United States*, 664 F.2d 1133 (9th Cir. 1981). This Court of Appeals decision is set out in Appendix G, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT AS TO THE PROPER INTERPRETATION OF 26 U.S.C. SECTION 4481, ET SEQ., AND THE TREASURY REGULATIONS THEREUNDER.

Section 4481 of the Code, Appendix C, *infra*, imposes an excise tax upon the use of any highway motor vehicle which, together with the trailers customarily used in connection with vehicles of the same type, has a taxable gross weight of more than 26,000 pounds. The term "taxable gross weight" is defined in Section 4482(b) of the Code, Appendix C, *infra*, as the sum of the following:

> (1) the actual unloaded weight of—
>
> (A) such highway motor vehicle fully equipped for service; and
>
> (B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle; and
>
> (2) the weight of the maximum load customarily carried on the highway motor vehicles of the same type as such highway motor vehicles and on the semitrailers and trailers referred to in paragraph (1)(B).

Section 4482(b) also grants authority to the Secretary of the Treasury to determine taxable gross weight under regulations which may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise.

Pursuant to the power conferred by Section 4482(b), the Secretary has promulgated Treasury Regulations which reiterate the statutory standards and definitions specified in Sections 4481(a) and 4482(b) of the Code. In this regard, Treasury Regulations, §41.4482(a)-1(b), Appendix D, *infra*, states that, although trailers which are used in combination with highway trucks are not themselves vehicles subject to the use tax, trailers "customarily used in combination with highway trucks or truck-tractors are taken into account in determining the taxable gross weight of the highway motor vehicle under §41.4482(b)-1, which is the base of the tax." Likewise, Treasury Regulations, §41.4482(b)-1(a), Appendix D, *infra*, provides, consistent with Section 4482(b) of the Code, that taxable gross weight is determined with reference, *inter alia*, to "the actual unloaded weight of any one or more trailers or semitrailers (fully equipped for service) customarily used in combination with highway motor vehicles of the same type as such highway motor vehicles" and "the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle."

Thus, Sections 4481(a) and 4482(b) of the Code, as well as §§41.4482(a)-1(b) and 41.4482(b)-1(a) of the Treasury Regulations, provide that the taxable gross weight of a highway vehicle is determined with reference to a trailer only if such trailer is "customarily used in connection with highway motor vehicles of the same type" as the vehicle in question. Consequently, the statutory and regulatory scheme provided for ascertaining a vehicle's taxable gross weight requires that a threshold question of fact be resolved concerning the customary use of the vehicles in combination with the trailers before the vehicles can be properly classified as either "truck-trailer" combinations or "single unit" vehicles.

The Government contends, however, that utility trucks which are equipped with pintle hooks capable of pulling trailers constitute "truck-trailer" combinations, rather than "single unit" vehicles, for purposes of computing their taxable gross weights, irrespective of whether such trucks are, in fact, of a type which are customarily used in connection with trailers. In granting the Government's motion for summary judgment below, the District Court held that the presence of pintle hooks on petitioner's trucks was alone sufficient to permit taxation of the vehicles as "truck-trailer" combinations. The District Court's decision is premised upon its conclusion that the power conferred upon the Secretary of the Treasury by Section 4482(b) to issue regulations for the determination of taxable gross weight is sufficient to allow the Secretary to ignore the "customarily used in connection with" requirement contained within the very same statute. The Court of Appeals for the Eighth Circuit summarily affirmed this decision.

The United States Court of Appeals for the Ninth Circuit has, however, in *Pacific Gas and Electric Company v. United States*, 664 F.2d 1133 (9th Cir. 1981), Appendix G, *infra*, held that—

> [t]he statute and the regulations make it clear that trailers are only to be included in the gross taxable weight of the truck if that type of trailer is customarily used with such type truck. Hence, the requirement of such "customary use" set forth in the statute and the regulations requires a factual determination of whether the type trailer is customarily used in connection with a motor vehicle of the same type as the motor vehicle (truck) of Pacific, rather than an arbitrary finding that any truck equipped with a pintle hook is one customarily so used

in combination. If the trailers are not customarily used with the type of truck, it is not subject to the tax.

The conflict thus existing between the Circuit Courts justifies the grant of certiorari to review the judgment below.

II. THE DECISION BELOW DEPARTS FROM APPLICABLE DECISIONS OF THIS COURT.

The District Court's holding below that the presence of the pintle hook alone is sufficient to permit taxation of the vehicles as "truck-trailer" combinations is premised upon its conclusion that the power conferred upon the Secretary of the Treasury by Section 4482(b) to issue regulations for the determination of taxable gross weight is sufficient to allow the Secretary to ignore the "customarily used in connection with" requirement contained within the very same statute. This Court has held, however, that where a Treasury regulation goes beyond administering the taxing statutes as they are written and creates a rule out of harmony with them, the regulation is a nullity. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 409, 80 L.Ed. 528, 531 (1936). The District Court's reliance upon "the discretion given to the Secretary in §4482 to determine vehicles' gross weights by employing specifications or classes", overlooks the very clear statutory language specifying the vehicular weight at which the highway use tax would commence and the loads which could be used in determining such vehicular weight. As such, this holding clearly departs from prior holdings of this Court that "regulations, in order to be valid must be consistent with the statute under which they are promulgated," *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 48, 56 (1977), and an agency's " 'interpretation' of the statute

cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 2496, 65 L.Ed.2d 532, 547 (1980).

In the instant case, Congress has imposed a tax on trucks weighing in excess of 26,000 pounds and has provided that in determining a truck's weight, the weight of any trailer customarily used in connection with trucks of the same type shall also be counted. In administering this tax, the Internal Revenue Service now resorts to the conclusive presumption that a truck which is equipped with a specific pintle hook is in fact a truck of the type with which heavy-duty trailers are customarily used. The Internal Revenue Service has taken this position without any evidentiary support and without any consideration given to the fact that the utilities have purposely equipped most of their trucks with heavy pintle hooks, not so they may be used customarily to tow trailers, but so that they may be so used in the event of emergencies. In *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), this Court held that a taxing statute which relied upon an irrebuttable presumption was unconstitutional. In so holding, this Court stated that (at p. 325):

> . . . a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the [Fifth] Amendment.

Further, in *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), this Court held that a state's interest in administrative ease and certainty cannot save a conclusive presumption from invalidity. Yet it was simply a concern for ease of administration that caused the District Court below to hold the Government's position to be correct.

If plaintiff's trucks were not in fact the types of trucks customarily used by the utility industry to tow trailers, then the tax imposed on such trucks constitutes a taking without due process of law. Clearly the concerns of the District Court regarding the taxing authority's burden in assessing a tax cannot override the constitutionally protected right of a taxpayer under the due process clause to have the opportunity to show that the statutory prerequisites to imposition of a tax are not present.

III. RESOLUTION OF THE QUESTION PRESENTED IS ESSENTIAL TO A PROPER ADMINISTRATION OF THE HIGHWAY USE TAX.

The Government's position that the presence of a pintle hook should be given conclusory effect in determining a vehicle's taxable gross weight for purposes of the highway use tax originated with the issuance of Revenue Ruling 76-294, 1976-2 C.B. 364, Appendix E, *infra*. Theretofore, the presence of a pintle hook was not conclusive; rather, the nature of the trailers customarily towed was considered when a truck was equipped with a pintle hook. Revenue Ruling 57-547, 1957-2 C.B. 789, Appendix E, *infra*. The adoption of this new position has subjected to tax many trucks utilized in the utility industry not previously taxable and has caused utilities around the country to commence actions contesting the correctness of such tax. Beyond the instant action and *Pacific Gas and Electric*, numerous other cases are now pending in the United States Court of Claims and in various District Courts. Petitioner also understands that the Internal Revenue Service has placed in suspense the claims for refund of other utilities pending the resolution of cases now filed. A resolution of the question

presented is thus essential to a proper and uniform administration of the highway use tax and is important to utilities located throughout the country.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Appendix

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1273

NORTHERN STATES POWER COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States
District Court for the
District of Minnesota.

Submitted: October 15, 1981
Filed: November 4, 1981

Before LAY, Chief Judge, McMILLIAN, Circuit Judge, and HUNTER,* Senior District Judge.

LAY, Chief Judge.

Northern States Power Company filed suit in the district court for a refund of $108,231 paid in highway motor vehicle use tax assessments for the years 1972 through 1978. It challenged the Internal Revenue Service's assessment of approxi-

*Elmo B. Hunter, Senior District Judge, Western District of Missouri, sitting by designation.

mately 500 utility trucks owned by it as tractor-trailer combinations rather than as single units. Northern claimed that its trucks should have been assessed as single units even though they are equipped for towing trailers. The district court concluded that under sections 4481 and 4482 of the Internal Revenue Code[1] vehicles which are equipped for use in truck-trailer combinations meet the truck-trailer classification under the statute. The court granted the government's motion for summary judgment and dismissed Northern's complaint. This appeal followed. On appeal Northern argues that the district court misconstrued the "customarily used in connection with"

---

[1] Section 4481 provides in relevant part:

> A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $3.00 a year for each 1,000 pounds of taxable gross weight or fraction thereof.

Section 4482 defines "taxable gross weight" as follows:

> For purposes of this subchapter, the term "taxable gross weight" when used with respect to any highway motor vehicle, means the sum of—
>
> (1) the actual unloaded weight of—
>
> (A) such highway motor vehicle fully equipped for service, and
>
> (B) the semitrailers and trailers (fully equipped for service) *customarily used in connection with highway motor vehicles* of the same type as such highway motor vehicle, and
>
> (2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).
>
> Taxable gross weight shall be determined under regulations prescribed by the Secretary or his delegate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

(Emphasis added.)

requirement found in section 4482(b) of the Code. It urges that the district court in granting summary judgment incorrectly focused on the fact that its trucks were equipped with pintle hooks for towing trailers rather than requiring the government to show that the trucks were customarily used for that purpose. We disagree.

Summary judgment is appropriate only where it is clear from the record that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. As we have often noted it is an extreme remedy, not to be granted unless the movant has established his right to judgment so as to leave no room for controversy and only if the other party is not entitled to judgment under any circumstances. *Unlaub Co. v. Sexton*, 568 F.2d 72, 76 (8th Cir. 1977). However, even under these strict guidelines, we conclude that the district court was correct in granting the government's motion here. There exists no genuine issue of fact and the IRS assessment of the vehicles as tractor-trailer combinations is consistent with language of sections 4481 and 4482 of the Code and their corresponding regulations. Accordingly, we affirm on the basis of the district court's opinion. See Eighth Circuit Rule 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

Northern States Power Company, Plaintiff v. United States of America, Defendant.

U. S. District Court, Dist. Minn., Third Div., Civil No. 3-79-382, Jan. 9, 1981.

Memorandum Opinion and Order

MURPHY, District Judge: In this action plaintiff Northern States Power Company seeks a refund from defendant United States of $108,231, plus interest, paid to satisfy highway motor vehicle use tax assessments for the taxable years ending June 30, 1973 through June 30, 1978. The Internal Revenue Service [IRS] based the assessments on plaintiff's undisputed ownership of utility trucks equipped with pintle hooks suitable for towing trailers having a gross vehicle weight in excess of 6,000 pounds and its ownership of such trailers. Plaintiff paid the assessed taxes and filed a claim for refund with the IRS, which was denied. This court has jurisdiction over this action for refund under 28 U. S. C. § 1346(a)(1). Defendant has filed a motion for summary judgment.

The issue presented to the court is whether the IRS may properly tax plaintiff's trucks as truck-trailer combinations, rather than as single units, without making a factual showing that the trucks are customarily used in combination with plaintiff's trailers. It is the court's opinion that it may.

Section 4481 of the Internal Revenue Code, 26 U.S.C. § 4481, imposes a tax on the "use of any highway motor vehicle which (together with the . . . trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicles) has a taxable gross weight of more than 26,000 pounds." Section 4482(b) of the Code provides that "taxable gross weight shall be determined under regulations prescribed by the Secretary (which regulations may in-

clude formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise.)." Pursuant to this section Treasury Regulation 41.4482 (b)-1(d), which provides a schedule of taxable gross weights for certain categories of motor vehicles, was promulgated. Any vehicle within a certain classification is deemed to have a specified gross weight regardless of its actual weight. Subsection (d)(3) classifies vehicles of a specified weight which are "equipped for use in combinations" as "truck-trailer combinations." It is within this category that the IRS has classified plaintiff's trucks.

The classification of plaintiff's trucks by the IRS is consistent with Revenue Ruling 76-294, 1976-2 Cum. Bull. 364, which concluded that a utility truck equipped with a pintle hook or similar coupling device suitable for towing a trailer with two or more axles, or a one-axle trailer with a gross trailer weight of 6,000 pounds or more, is a vehicle "equipped for use in combinations" and is properly classified within the truck-trailer combination category.[1]

At least one federal court has dealt with the issue presented in the instant case. *Pacific Gas and Electric Co. v. United States*, No. C-79-0596-WWS (N. D. Cal. 1980), held that the Secretary or his delegates need not make an evidentiary finding that the utility vehicles in question are actually customarily used with trailers in order to tax them as truck-trailer combinations, but can instead impose a tax based upon regulations keyed to certain specifications of the vehicles.

---

[1] An earlier Revenue Ruling, Rev. Rul. 57-547, 1957-2 Cum. Bull. 789, concluded that utility trucks equipped with coupling devices suitable for pulling pipe or pole dollies or similar lightweight trailers were not within the truck-trailer combination category. A distinction between such vehicles and the vehicles under consideration in this case was made in Rev. Rul. 76-294 on the basis on the gross vehicle weights and number of axles of the types of trailers used with the vehicles.

The clear language of §§ 4481 and 4482 of the Code supports defendant's taxation of plaintiff's trucks as truck-trailer combinations. Section 4481 imposes a tax on the use of any vehicle which, together with the trailers customarily used in connection with vehicles "of the same type", has a certain gross weight. The "customary use" in the statute defines the type of trailer which may be included in the weight computation for the vehicle. The statute does not specify that the trailer actually be customarily used with the taxable vehicle, but only that the trailers be of the kind customarily used with that *type* of vehicle. No evidentiary showing that a particular taxpayer's vehicles are so used is required. Section 4482 allows the Secretary to prescribe regulations to determine the gross weight of a vehicle. That determination obviously includes a decision whether to classify a vehicle as the type customarily used in combination with trailers. Pursuant to § 4482 Treasury Regulation 41.4482(b)-1(d) was prescribed, classifying vehicles "equipped for use in combinations" in the gross weight category for truck-trailer combinations. Because plaintiff's vehicles are so equipped, they were properly taxed within that category.[2]

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[2] Plaintiff argues that Treasury Regulation 41.4481(b)-1(d) incorporates a customary use standard, or, that if it does not, the regulation is inconsistent with § 4481 and is therefore invalid. This argument ignores the discretion given to the Secretary in § 4482 to determine vehicles' gross weights by employing specifications or classes. The Secretary's use of the "equipped for use with" classification to determine the proper tax to be assessed for vehicles of the type owned by plaintiff was not inconsistent with this statutory provision.

Plaintiff also argues that even the IRS itself has employed a customary use standard in its Revenue Rulings. This standard was, however, employed in those rulings to determine whether a certain *type* of vehicle should be classified as a truck-trailer combination. There is no indication in the Revenue Rulings that the customary use standard should be applied separately to each vehicle owned by a taxpayer. See *e. g.* Rev. Ruls. 76-558, 76-294, and 74-539.

This result is further supported by the principle that assessment of taxes should not be unduly burdensome for the taxing authority. This principle was relied upon in both *Atlas Transportation Co. v. United States*, 263 F. 2d 573 (3d Cir. 1959), *cert. denied*, 360 U. S. 918, 79 S.Ct. 1437, 3 L.Ed.2d 1534 (1959), and *North American Van Lines v. United States*, 169 F. Supp. 252 (Ct. Cl. 1959), *cert. denied*, 359 U. S. 1011, 79 S.Ct. 1148, 3 L.Ed.2d 1036 (1959). In both cases the plaintiffs attacked the validity of Treas. Reg. 41.4482(b)-1 because the actual weight of their equipment and the loads they carried were allegedly less than the weight attributed to them under the regulation's classification scheme. In both decisions the courts focused upon the practicality and convenience of assessing the tax. For example, the *Atlas Transportation* court noted that

> there is a great practical advantage both for the taxpayer and the taxing authority in having a classification which is understandable and easy to apply. If that result is to be achieved it is obvious that no one taxpayer can insist that a classification shall be made to fit precisely each of his vehicles or even his vehicles as a group.
>
> 263 F.2d at 576.

This principle applies in the present case. If, as plaintiff suggests, the IRS were required to make a factual showing that all a taxpayer's vehicles were actually customarily used in combination with trailers, the collection of the tax would be extremely burdensome, if not impossible. To avoid this burdensome situation the Secretary properly exercised his authority to classify trucks such as those owned by plaintiff as the type customarily used in combinations.[3]

---

[3] Plaintiff contends that the absence of any study relevant to industry practices concerning use of utility trucks with trailers "creates serious doubt concerning the rationality" of this classification. This contention is without merit. In § 4482(b) Congress clearly gave the Secretary the discretion to use classifications to determine gross vehicle weights and did not require the Secretary to make a formal study before that discretion was exercised.

Because there are no material facts in dispute and because the defendant is entitled to judgment as a matter of law, summary judgment is proper in this case.

Order

Accordingly, upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted and the action is dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX C

Internal Revenue Code of 1954 (26 U.S.C.):

§ 4481. Imposition of tax

(a) Imposition of tax.—A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $3.00 a year for each 1,000 pounds of taxable gross weight or fraction thereof. In the case of the taxable period beginning on July 1, 1979, and ending on September 30, 1979, the tax shall be at the rate of 75 cents for such period for each 1,000 pounds of taxable gross weight or fraction thereof.

(b) By whom paid.—The tax imposed by this section shall be paid by the person in whose name the highway motor vehicle is, or is required to be, registered under the law of the State in which such vehicle is, or is required to be, registered, or, in case the highway motor vehicle is owned by the United States, by the agency or instrumentality of the United States operating such vehicle.

(c) Proration of tax.—If in any taxable period the first use of the highway motor vehicle is after the first month in such period, the tax shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such taxable period.

(d) One tax liability per period.—

(1) In general.—To the extent that the tax imposed by this section is paid with respect to any highway motor vehicle for any taxable period, no further tax shall be imposed by this section for such taxable period with respect to such vehicle.

(2) Cross reference.—

For privilege of paying tax imposed by this section in installments, see section 6156.

(e) Period tax in effect.—The tax imposed by this section shall apply only to use before October 1, 1979.

Added June 29, 1956, c. 462, Title II, § 206(a), 70 Stat. 390, and amended June 29, 1961, Pub.L. 87-61, Title II, § 203(a) (b) (1), (2) (A), (B), 75 Stat. 124; Dec. 31, 1970, Pub.L. 91-605, Title III, § 303(a) (7), (8), 84 Stat. 1744; May 5, 1976, Pub.L. 94-280, Title III, § 303(a) (7), (8), 90 Stat. 456.

§ 4482. Definitions

(a) Highway motor vehicle.—For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

(b) Taxable gross weight.—For purposes of this subchapter, the term "taxable gross weight", when used with respect to any highway motor vehicle, means the sum of—

(1) the actual unloaded weight of—

(A) such highway motor vehicle fully equipped for service, and

(B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and

(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1) (B).

Taxable gross weight shall be determined under regulations prescribed by the Secretary (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

(c) Other definitions.—For purposes of this subchapter —

(1) State.—The term "State" means a State and the District of Columbia.

(2) Year.—The term "year" means the one-year period beginning on July 1.

(3) Use.—The term "use" means use in the United States on the public highways.

(4) Taxable period.—The term "taxable period" means any year beginning before July 1, 1979, and the period which begins on July 1, 1979, and ends at the close of September 30, 1979.

Added June 29, 1956, c. 462, Title II, § 206(a), 70 Stat. 390, and amended June 29, 1961, Pub.L. 87-61, Title II, § 203(b) (2) (C), 75 Stat. 125; Dec. 31, 1970, Pub.L. 91-605, Title III, § 303(a) (9), 84 Stat. 1744; May 5, 1976, Pub.L. 94-280, Title III, § 303(a) (9), 90 Stat. 456; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §§ 1904(c), 1906(b) (13) (A), 90 Stat. 1818, 1834.

APPENDIX D

Treasury Regulations on Highway Motor Vehicle Tax. (26 C.F.R.):

§ 41.4482(a)-1 Definition of highway motor vehicle.

(a) *Highway motor vehicle.* The term "highway motor vehicle" means any vehicle that is both—

(1) A vehicle propelled by means of its own motor, whether such motor is powered by gasoline, diesel fuel, special motor fuels, electricity, or otherwise, and

(2) A "highway vehicle" as defined in paragraph (c) of this section.

(b) *Treatment of certain excluded vehicles.* Although trailers and semitrailers used in combination with highway trucks or truck-tractors are not vehicles the use of which is subject to the tax imposed by section 4481(a), trailers and semitrailers customarily used in combination with highway trucks or truck-tractors are taken into account in determining the taxable gross weight of the highway motor vehicle under § 41.4482(b)-1, which is the base of the tax.

(c) *Highway vehicle.* For the definition of the term "highway vehicle" as used in this subchapter, see § 48.4061(a)-1(d).

§ 41.4482(b)-1 Definition of taxable gross weight.

(a) *In general.* The tax imposed on the use of a highway motor vehicle (of a taxable gross weight in excess of 26,000 pounds) is based on the taxable gross weight of such highway motor vehicle. Taxable gross weight of a highway motor vehicle is determined with reference to the sum of (1) the actual unloaded weight of such highway motor vehicle (fully equipped for service); (2) the actual unloaded weight of any

one or more trailers or semitrailers (fully equipped for service) customarily used in combination with highway motor vehicles of the same type as such highway motor vehicle; and (3) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on any one or more trailers or semitrailers customarily used in combination with highway motor vehicles of the same type as such highway motor vehicle.

(b) *Meaning of terms.* For purposes of the schedule of taxable gross weights prescribed in paragraph (c) of this section—

(1) The term "actual unloaded weight" means the empty (or tare) weight of the truck, truck-tractor, or bus, fully equipped for service.

(2) The term "fully equipped for service"—

(i) In the case of trucks and truck-tractors, includes body (whether or not designed and adapted primarily for transporting cargo, as for example, concrete mixers); all accessories; all equipment attached to or carried on such truck or truck-tractor for use in connection with the movement of the vehicle by means of its own motor or for use in the maintenance of the vehicle; and a full complement of lubricants, fuel, and water. The term does not include driver, any equipment (not including body) attached to or carried on the vehicle for use in handling, protecting, or preserving cargo; or any special equipment (such as an air compressor, crane, specialized oilfield machinery, etc.) mounted on the vehicle for use on construction jobs, in oilfield operations, etc.,

(ii) In the case of buses, for taxable periods beginning before July 1, 1964, includes body; all accessories; all equipment attached to or carried on such bus for use in connection with the movement of the vehicle by means of its own motor or for

use in the maintenance of the vehicle; and a full complement of lubricants, fuel, and water. The term does not include driver or any equipment (not including body) attached to or carried on the vehicle for the accommodation of passengers or others (such as air-conditioning equipment and sanitation facilities, etc.), and

(iii) In the case of buses, for taxable periods beginning on or after July 1, 1964, includes body; all accessories; all equipment attached to or carried on such bus for use in connection with the movement of the vehicle by means of its own motor, for use in the maintenance of the vehicle, or for the accommodation of passengers or others (such as air-conditioning equipment and sanitation facilities, etc.); and a full complement of lubricants, fuel, and water. The term does not include driver.

(c) *Schedule of taxable gross weights for periods before July 1, 1969.* The following schedule of taxable gross weights, based on the sum of the weights referred to in paragraph (a) of this section, is hereby prescribed for taxable periods beginning before July 1, 1969:

USE TAX SCHEDULE

	Taxable gross weight (in pounds)
1. *Single units*	
2 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more	27,000
3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of at least 13,000 pounds and less than 16,000 pounds	30,000

3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of 16,000 pounds or more	40,000
2. *Combinations*	
2 axled truck-tractor with actual unloaded weight of at least 5,500 pounds and less than 7,000 pounds	30,000
2 axled truck-tractor with actual unloaded weight of at least 7,000 pounds and less than 9,500 pounds	40,000
2 axled truck-tractor with actual unloaded weight of 9,500 pounds or more	50,000
2 axled truck with actual unloaded weight of at least 9,000 pounds and less than 12,000 pounds and equipped for use in combinations	40,000
2 axled truck with actual unloaded weight of 12,000 pounds or more and equipped for use in combinations	55,000
3 or 4 axled truck equipped for use in combinations	60,000
3 or 4 axled truck-tractor	60,000

3. *Buses:* Actual unloaded weight of vehicle plus 150 pounds for each unit of seating capacity provided for passengers and driver.

Any highway motor vehicle which falls in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have the taxable gross weight assigned to such category. Any highway motor vehicle which does not fall in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have a taxable gross weight of 26,000 pounds or less.

(d) *Schedule of taxable gross weights for periods after June 30, 1969.* The following schedule of taxable gross

weights, based on the sum of the weights referred to in paragraph (a) of this section, is hereby prescribed for taxable periods beginning on or after July 1, 1969. Any highway motor vehicle which falls in one of the categories shown in the following schedule shall be considered, for purposes of the regulations in this part, to have the taxable gross weight assigned to such category. Any highway motor vehicle which does not fall in one of the categories shown in the following schedule shall be considered, for purposes of the regulations in this part, to have a taxable gross weight of 26,000 pounds or less.

USE TAX SCHEDULE

	Taxable gross weight (in pounds)
1. *Single units*	
(a) 2 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more	27,000
(b) 3 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more and less than 16,000 pounds	30,000
(c) 3 axled truck equipped for use as a single unit with actual unloaded weight of 16,000 pounds or more	40,000
(d) 4 axled truck equipped for use as a single unit with actual unloaded weight of less than 22,000 pounds	55,000
1. Single units:	
e) 4 axled truck equipped for use as a single unit with actual unloaded weight of 22,000 pounds or more and less than 30,000 pounds	68,000

(f) 4 axled truck equipped for use as a single unit with actual unloaded weight of 30,000 pounds or more 80,000

(g) More than 4 axled truck equipped for use as a single unit .....2.5 times actual unloaded weight.

2. *Tractor-trailer combinations*

(h) 2 axled truck-tractor with actual unloaded weight of 5,500 pounds or more and less than 7,000 pounds 30,000

(i) 2 axled truck-tractor with actual unloaded weight of 7,000 pounds or more and less than 9,500 pounds 40,000

(j) 2 axled truck-tractor with actual unloaded weight of 9,500 pounds or more and less than 11,000 pounds 50,000

(k) 2 axled truck-tractor with actual unloaded weight of 11,000 pounds or more 60,000

(l) 3 or 4 axled truck-tractor with actual unloaded weight of less than 13,000 pounds 65,000

(m) 3 or 4 axled truck-tractor with actual unloaded weight of 13,000 pounds or more and less than 17,000 pounds 70,000

(n) 3 or 4 axled truck-tractor with actual unloaded weight of 17,000 pounds or more 74,000

(o) More than 4 axled truck-tractor .....4.5 times actual unloaded weight.

3. *Truck-trailer combinations*

(p) 2 axled truck with actual unloaded weight of 9,000 pounds or more and less than 12,000 pounds and equipped for use in combinations	40,000
(q) 2 axled truck with actual unloaded weight of 12,000 pounds or more and equipped for use in combinations	55,000
(r) 3 or 4 axled truck with actual unloaded weight of less than 14,000 pounds and equipped for use in combinations	65,000
(s) 3 or 4 axled truck with actual unloaded weight of 14,000 pounds or more and less than 19,000 pounds and equipped for use in combinations	74,000
(t) 3 or 4 axled truck with actual unloaded weight of 19,000 pounds or more and equipped for use in combinations	76,000
(u) More than 4 axled truck equipped for use in combinations	4.5 times actual unloaded weight.

4. *Buses:*

Actual unloaded weight of vehicle plus 150 pounds for each unit of seating capacity provided for passengers and driver.

APPENDIX E

Rev. Rul. 57-547

A utility truck of a type designed for transportation of personnel, tools, and equipment, such as those used by public utility companies in the maintenance and installation of poles, lines, pipe conduits, etc., which is equipped with a pintle hook or similar coupling device, is not considered to be "equipped for use in combinations." Rather, it is classed as a "single unit" vehicle for purposes of determining its taxable gross weight under the use tax schedule set forth in section 41.4482(b)-1(c) of the Highway Motor Vehicle Use Tax Regulations.

The Internal Revenue Service has been asked whether a utility truck of a type designed for the transportation of personnel, tools, and equipment, such as those used by public utility companies in the maintenance and installation of poles, lines, pipe conduits, etc., which is equipped with a pintle hook or similar coupling device for pulling a pipe or pole dolly, tool or equipment trailer, or other similar lightweight trailer, is classed as a "single unit" vehicle or as a vehicle "equipped for use in combinations" for purposes of determining its taxable gross weight under the Highway Motor Vehicle Use Tax Regulations.

Section 4481(a) of the Internal Revenue Code of 1954 imposes a tax upon the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $1.50 per year for each 1,000 pounds of taxable gross weight or fraction thereof.

Section 4482(b) of the Code provides:

TAXABLE GROSS WEIGHT.—For purposes of this subchapter, the term "taxable gross weight," when used with respect to any highway motor vehicle, means the sum of—

(1) the actual unloaded weight of—

(A) such highway motor vehicle fully equipped for service, and

(B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and

(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicles and on the semitrailers and trailers referred to in paragraph (1) (B).

Taxable gross weight shall be determined under regulations prescribed by the Secretary or his delegate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

Pursuant to the authority contained in section 4482(b) of the Code and in the light of the statutory definition of taxable gross weight set forth in that section, a schedule of taxable gross weights for use in determining the amount of the tax imposed under section 4481 (a) in the case of any highway motor vehicle is prescribed in section 41.4482 (b)-1(c) of the regulations. Under this schedule, the taxable gross weight of a truck depends upon a number of factors, among them being whether the vehicle is "equipped for use as a single unit" or is "equipped for use in combinations." If "equipped for use as a single unit," the taxable gross weight (if any) assigned under the schedule is less than would be the case if the truck were "equipped for use in combinations." Any vehicle not as-

signed a taxable gross weight under the schedule is considered to have a "taxable gross weight" of 26,000 pounds or less, and the use of such vehicle is, therefore, not subject to the tax.

It is held that a utility truck of a type designed for transportation of personnel, tools, and equipment, such as those used by public utility companies in the maintenance and installation of poles, lines, pipe conduits, etc., which is equipped with a pintle hook or similar coupling device for pulling a pipe or pole dolly, tool or equipment trailer, or other similar lightweight trailer, is not "equipped for use in combinations." Rather, it is classed as a "single unit" vehicle for purposes of determining its taxable gross weight under the use tax schedule set forth in section 41.4482(b)-1(c) of the regulations. Accordingly, where a truck of the type described above does not have an actual unloaded weight fully equipped for service of 13,000 pounds or more, it will not be subject to the tax.

Rev. Rul. 76-294

The Internal Revenue Service has been asked whether the conclusion set forth in Rev. Rul. 57-547, 1957-2 C.B. 789, with respect to the classification of certain utility trucks for purposes of the highway use tax imposed by section 4481(a) of the Internal Revenue Code of 1954, applies with respect to the utility trucks described below.

Rev. Rul. 57-547 is concerned with the classification for highway use tax purposes, of a utility truck of the type designed for the transportation of personnel, tools, and equipment. The vehicle is used by public utility companies in the maintenance and installation of poles, lines, pipe conduits, etc., and it is equipped with a pintle hook or similar coupling device for pulling a pipe or pole dolly, tool or equipment trailer, or other similar "lightweight" trailer. Under the Revenue Ruling, the vehicle is classified as a "single unit" for purposes of

determining its taxable gross weight as provided in the use tax schedule set forth in the regulations.

As indicated above, in addition to transporting tools and equipment, the vehicle described in Rev. Rul. 57-547 is also designed to transport personnel; that is, accommodations are built into the body of the truck for transporting crew members who cannot be accommodated in the cab of the truck. The vehicles that are the subject of the request for advice in the instant case are also designed to transport tools and equipment in the same manner as the vehicle described in Rev. Rul. 57-547, however, they may be distinguished in two ways: (1) some of the trucks do not have crew compartments, and (2) all the trucks are equipped with pintle hooks or similar coupling devices that enable the vehicles to tow trailers of substantially greater weight than the pipe or pole dollies, or similar lightweight trailers referred to in Rev. Rul. 57-547.

The specific question asked is whether the holding in Rev. Rul. 57-547 to the effect that the utility truck described therein is classifiable as a single unit within the meaning of section 41.4482(b)-1(d) of the Highway Motor Vehicle Use Tax Regulations, also applies to the vehicles in the instant case, or whether the latter vehicles should be classified as "truck-trailer combinations" under the regulations.

Section 4481(a) of the Code imposes a tax upon the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds.

Section 4482(b) of the Code provides as follows:

Taxable Gross Weight.—For purposes of this subchapter, the term "taxable gross weight," when used with respect to any highway motor vehicle, means the sum of—

(1) The actual unloaded weight of

(A) such highway motor vehicle fully equipped for service, and

(B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and

(2) The weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).

Taxable gross weight shall be determined under regulations prescribed by the Secretary or his delegate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

The schedule of taxable gross weights for determining the amount of the tax imposed under section 4481 of the Code is prescribed in section 41.4482(b)-1(d) of the regulations. For purposes of determining the taxable gross weight of a highway motor vehicle, the schedule includes the categories single units and truck-trailer combinations.

In the single unit category is any truck designed for the transportation of property, and which is not equipped to tow a trailer or semitrailer of the type that forms a "combination" when coupled with a truck. In the truck-trailer combination category is any truck designed primarily for the transportation of property, and which is equipped for towing trailers or semitrailers of the type that form a combination when coupled with a truck, if trucks of the same type, when so equipped, are customarily used to tow such trailers or semitrailers. Trailers having two or more axles, and one-axled trailers with a gross vehicle weight (as defined in section 142.-

1-1(d)(3) of the Temporary Excise Tax Regulations under the Revenue Act of 1971) of 6,000 pounds or more, are trailers of the type that form a combination when coupled with a truck.

Under the foregoing (A) a utility truck equipped with a pintle hook or similar coupling device suitable only for towing one-axled trailers with a gross vehicle weight of less than 6,000 pounds is not "equipped for use in combinations" and, therefore, is within the single unit category of the use tax schedule.

(B) A utility truck equipped with a pintle hook or similar coupling device suitable for towing a trailer with two or more axles, or a one-axled trailer with a gross vehicle weight of 6,000 pounds or more is a truck "equipped for use in combinations" and therefore is within the truck-trailer combination category of the use tax schedule.

It is immaterial whether in (A) and (B) above the trucks contain crew compartments.

The lightweight, special purpose trailers referred to in Rev. Rul. 57-547 are of the type described in (A) above that do not form a combination when coupled with a truck. Accordingly, the holding in Rev. Rul. 57-547 is not applicable to the utility trucks described in the instant case since they are of the type described in (B) above, and are classified as truck-trailer combinations within the meaning of section 41.4482 (b)-1(d) of the regulations.

Rev. Rul. 57-547 is modified to state the position on utility trucks equipped with pintle hooks or similar coupling devices to tow heavier trailers.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-79-0596-WWS

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Date January 18, 1980:

The Clerk: Civil Case 79-0596, Pacific Gas and Electric Company versus The United States of America.

Counsel, state your appearances, please.

Ms. Woo: Shirley Woo appearing for Pacific Gas and Electric Company.

Mr. Niesen: Jeffrey Niesen appearing for the United States, Your Honor.

The Court: Do you want to add anything other than what is in the briefs, anything additional I should know?

Ms. Woo: I feel the matter has been well briefed and I have no additional arguments to add.

The Court: I will give you my ruling, then.

Mr. Niesen: That is fine. I am willing to submit it, Your Honor.

The Court: You have to work yourself through this statutory scheme, and the way I see it, you start out with Sec-

tion 4481, which imposes a tax on highway motor vehicles which, together with trailers, are customarily used in connection with highway motor vehicles of the same type exceeding 26,000 pounds. So 4481 sets up the standard for combined vehicles, whether it is customarily used in connection with the trailer. I mean, sets up a standard for highway motor vehicles on the basis of whether they are customarily used in connection with the trailer. And 4482 carries that forward in setting up the procedure for determining what the taxable gross weight is. And it determines that it is the actual unloaded weight of the highway motor vehicle plus the trailer customarily used in connection with a motor vehicle of this type.

When you go to the regulations, the regulations which were adopted provide that the tax shall be imposed in accordance with the tax schedule which is found in 41.4482(b)-1(d). And section three of the schedule says that tractor trailer combinations, refers to truck trailer combinations, rather, and it imposes a tax keyed to a certain assumed combined weight of trucks and trailers where the truck is, quote, equipped for use in combinations.

Now, my first reaction to this was that "equipped for use in combinations" is not consistent with the statutory standard of "customarily used." That is, just because something is equipped for use in combination doesn't mean it is customarily used. But then when I read the end of Section 4482—and the language there is: the taxable gross weight shall be determined under regulations prescribed by the Secretary or his delegates, which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise. On the basis of that language, I must conclude that Congress authorized the Internal Revenue Service to adopt regulations which impose a tax based upon the specifications of vehicles or other criteria.

In other words, what Congress is saying here is that the Secretary is not limited to imposing a tax on the basis of an actual evidentiary finding that the vehicles were, in fact, customarily used with trailers but he can impose a tax based upon regulations which are keyed to certain specifications. I would include in that the characteristics of the vehicle, including a pintle hook.

And I think that type of interpretation was approved in the *North American Van Lines* case. It is not *North American*, it is *Atlas Van Lines*, I think. There the reference was to formulas rather than specifications and the arbitrary assignment of certain weights and weight categories. And while that isn't controlling here, I think that it reflects a correct interpretation of the enabling provisions of 4482(b) and the kind of authority and the breadth of the authority given to the Secretary in adopting the regulations.

So although the regulations themselves—well, let's put it another way.

Although the statute itself might suggest that the Secretary could impose the tax only when there is a showing that vehicles of this type are, in fact, customarily used, Congress, in effect, said, "well, we are not going to hold you to that strict standard and you can adopt regulation that impose the tax along the lines based on the specifications of the vehicles," and that is what they have done.

So I think the regulation is valid, and since the regulation is valid, the Secretary acted in a manner consistent with the regulation and, therefore, the plaintiff's claim is without merit.

Ms. Woo: Well, Your Honor, the statute, the last sentence of IRC Code Section 4482 does give the Commissioner wide

discretion in the establishment of regulations and we do not contest that. We do not contest the actual distribution of weights that were different from the weights of our trucks. However, we felt, given the Congressional intent, that you are looking for vehicles that are customarily used with trailers which impose a heavy load on the road. And the interpretation the Service has given to "combinations and use", within the meaning of the trucking industry, it is questionable whether the regulations, by only looking to the presence of a hook in the case of the utility industry, was consistent with the statute.

The Court: There was that question, but I am satisfied that it is because of the broad power that Congress has given to the Secretary to impose regulations, impose a tax based upon the specifications or other characteristics of the vehicles themselves. So while the statutory language is narrow, the Secretary is given very broad discretion in applying it. My first reaction was the same as yours, Ms. Woo, but I have concluded that mine was as erroneous as yours and that is the correct answer.

Ms. Woo: Thank you, Your Honor.

Mr. Niesen: Shall I prepare findings, Your Honor?

The Court: I don't think we need findings, do we? Don't we have an order here from you?

Mr. Niesen: Yes, I believe you do, Your Honor. If not, I will make sure that one is before you.

The Court: Will you submit an order, then? You can just briefly state the ground for the order, that being the provision authorizing the Secretary to adopt regulations that impose the tax as provided in 4482(b).

APPENDIX G

PACIFIC GAS AND ELECTRIC COMPANY,
a corporation,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 80-4132.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 16, 1981.
Decided Dec. 28, 1981.

Appeal from the United States District Court for the Northern District of California.

Before TANG and FERGUSON, Circuit Judges, and KELLAM*, Senior District Judge.

KELLAM, Senior District Judge:

Pacific Gas and Electric Company (Pacific) instituted this action seeking a refund of highway use taxes paid under protest for the periods September 1, 1972, through June 30, 1976. After a response by the United States, each party submitted a motion for summary judgment. Based on the presence of pintle hooks on the motor vehicles of Pacific the Internal Revenue Service determined that the taxpayer's trucks should be treated as truck-trailer combinations rather than as single

* The Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

unit vehicles in computing the taxable gross weight for highway tax purposes. The district court agreed and granted summary judgment.

I

Pacific is a public utility company providing gas and electric service to the public in parts of California. In the operation of its facilities, it utilizes various types of trucks and other equipment in the construction, operation and maintenance of its utility system. Similar type trucks are used throughout the industry, and by other persons. Certain described vehicles are subject to a tax imposed on highway motor vehicles pursuant to 26 U.S.C. § 4481. The designation and application of the classification of such vehicles is the subject of this action.

In 1957, the Internal Revenue Service decided that a utility truck designated for transportation of personnel, tools and equipment and equipped with a pintle hook would be considered a single unit for purposes of determining its taxable gross weight for Federal Highway Use Tax purposes. Revenue Ruling 57-547, 1957-2 C.B. 789. In that ruling, it was recognized that utility trucks equipped with pintle hooks sometimes pulled lightweight trailers such as pole or pipe dollies and tool or equipment trailers. Even so, such trucks were classified as single units for Highway Use Tax purposes, and such vehicles were so taxed for a number of years.

In 1976, the IRS issued Revenue Ruling 76-294, 1976-2 C.B. 364 changing and modifying the prior 1957 ruling. In the 1976 ruling, the IRS took the position that trucks used by utilities which were equipped with heavy pintle[1] hooks were to be

[1] A pintle hook is a mechanism that can be attached to the back of a truck or other motor vehicle which will enable that vehicle to pull a trailer or other piece of equipment if the other piece of equipment is equipped with an eye that will go into the hook. Pacific routinely equips many of its trucks with such a hook which will pull loads of over 6,000 pounds.

taxed as truck-trailer combinations rather than as single units as before. The ruling provided that light trailers with gross vehicle weights below 6,000 pounds do not form a combination with a truck within the aforesaid section 4482. But trucks owned by the utility equipped with pintle hooks capable of towing trailers with gross vehicle weights of over 6,000 pounds (heavy trailer) were to be taxed as truck-trailer combinations, without regard to whether that type of truck was customarily used with heavy trailers. Heavy trailers are referred to as trailers with two or more axles, or a one axle trailer with a gross weight of 6,000 pounds or more.

Based solely on the presence of pintle hooks, IRS determined that the trucks of Pacific should be classified and taxed as truck-trailer combinations, rather than as single unit vehicles.

II

Section 4481(a), the section in question, imposes a tax on the use of any highway motor vehicle "which [together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle] has a taxable gross weight of more than 26,000 pounds . . . ." 26 U.S.C. § 4481(a).[2] Section 4482(b) defines taxable gross weight thusly—

> (1) the actual unloaded weight of—
>
> (A) such highway motor vehicle fully equipped for service; and
>
> (B) the semitrailers or trailers (fully equipped for service) customarily used in connection with highway

---

[2] The portion of 26 U.S.C. § 4481(a) pertinent to the issue provides:

> (a) Imposition of tax. A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds . . . .

motor vehicles of the same type as such highway motor vehicle; and

(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type . . . and on the semitrailers and trailers referred to in paragraph (1)(B).

Section 4482(b) gives the Secretary authority to determine taxable gross weight under regulations prescribed by the Secretary which may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise.

Pursuant to the provisions of the statute IRS established three main classifications of trucks for application of the tax —(1) single unit vehicles, (2) tractor-trailer combinations, and (3) truck-trailer combinations. 26 C. F. R. Section 41.4482(b)-1(d).

Under the regulations trucks not equipped to tow a trailer of the type that forms a combination are treated as single units. But trucks regarded as equipped for use as combinations —a truck equipped with a heavy pintle hook—are categorized as truck-trailer combination vehicles under the regulations, regardless of whether these types of vehicles are customarily used in combination with such trailers. Such interpretation is inconsistent with the unambiguous provisions of the statute. Section 4482 specifically provides that the tax will be imposed on the motor vehicle when it is one of the type customarily used in connection with a trailer or semitrailer and having the requisite weight. Section 4481 imposes a tax on "any highway motor vehicle which [together with the semitrailers and trailers *customarily used* in connection with highway motor vehicles of the same type as such highway motor vehicle] has a taxable gross weight of more than 26,000 pounds . . . ."

[Underscoring added]. The same customary use standard is repeated in Treasury Regulation Section 41.4482(a)-1(b) and 41.4482(b)-1(a). Section 41.4482(a)-1(b) of the Regulations provides that although trailers themselves are not highway vehicles subject to the tax, trailers and semitrailers customarily used in combination with highway trucks or truck-tractors are taken into account in determining the taxable gross weight of the truck or truck-tractor. Section 41.4482(b)-1(a) defines the taxable gross weight of a highway vehicle to include the actual unloaded weight of any one or more trailers or semitrailers (fully equipped for service) customarily used in combination with highway motor vehicles of the same type as such highway motor vehicles.

The statute and the regulations make it clear that trailers are only to be included in the gross taxable weight of the truck if that type of trailer is customarily used with such type truck. Hence, the requirement of such "customary use" set forth in the statute and the regulations requires a factual determination of whether the type trailer is customarily used in connection with a motor vehicle of the same type as the motor vehicle (truck) of Pacific, rather than an arbitrary finding that any truck equipped with a pintle hook is one customarily so used in combination. If the trailers are not customarily used with the type of truck, it is not subject to the tax. The correct interpretation of Regulation Section 41.4482 (b)-1(d) must be consistent with the requirements of the statute that only those trailers which are "customarily used in connection with" vehicles of the same type as the trucks of Pacific may be included in the computation of the taxable gross weight of the vehicle. Any other interpretation brings the regulation in conflict with the statute. It is clear that "regulations, in order to be valid must be consistent with the

statute under which they are promulgated," *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2151, 2156, 53 L.Ed.2d 48 (1977), and the agency's " 'interpretation' of the statute cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 2496, 65 L. Ed.2d 532 (1980). The power of an administrative officer or agency to administer a federal statute and "to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute," and a regulation which operates to create a rule out of harmony with the statute, is a mere nullity. *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S.Ct. 397, 409, 80 L.Ed. 528 (1936). *See also General Electric v. Gilbert*, 429 U.S. 125, 140-142, 97 S.Ct. 401, 410-411, 50 L.Ed.2d 343 (1976); *Security and Exchange Commission v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978).

An interpretation of the statute or regulations which permits the Internal Revenue Service to classify a vehicle as a "truck trailer" combination merely because the vehicle is "equipped for use in combination" with trailers, such as equipped with a pintle hook, without first determining that such trailer or semitrailer is the type customarily used in combination with such vehicle is erroneous and any regulation permitting the same is contrary to the statute and therefore invalid and of no effect.

The action is REVERSED and REMANDED for a factual determination as to whether trailers and/or semitrailers are customarily used in connection with highway motor vehicles of the same type operated by Pacific.

REVERSED and REMANDED.

Opposition

Supreme Court, U.S.
FILED
APR 13 1982
ALEXANDER L. STEVAS

No. 81-1437

In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN STATES POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the decision below correctly upheld the Internal Revenue Service's classification of petitioner's utility trucks as "truck-trailer" combinations, pursuant to Sections 4481 and 4482 of the Internal Revenue Code of 1954 and the regulations, on the ground that its trucks were of the type that is customarily used to tow a trailer of a prescribed weight.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 663 F.2d 55. The opinion of the district court (Pet. App. A4-A8) is reported at 503 F. Supp. 1182.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1981. The petition for a writ of certiorari was filed on January 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a public utility company organized as a Minnesota corporation providing electric service in several states (Pet. 3; Doc. 1).[1] During 1972-1978, petitioner owned and operated approximately 500 trucks to construct, service and repair its utility systems (Pet. 3). Almost all of the trucks were equipped with heavy duty pintle hooks[2] suitable for pulling large-capacity trailers (in excess of 6,000 pounds). Petitioner also owned some 500 trailers, approximately 46 percent of which had a gross weight of 6,000 pounds or more (*ibid.*).

In reporting its highway use tax liability under the provisions of Section 4481 of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. III)), petitioner classified its trucks as "single unit" vehicles, rather than as "truck-trailer" combinations, thereby resulting in a lower excise tax liability (Pet. 3; Doc. 1). On audit, however, the Internal Revenue Service determined that petitioner's trucks, equipped with heavy duty pintle hooks and capable of pulling large-capacity trailers, were properly classified as "equipped for use in combinations" and accordingly taxed as truck-trailers (Doc. 1). The Service therefore assessed deficiencies in highway use taxes against taxpayer (Doc. 1).

Petitioner instituted this action in the United States District Court for the District of Minnesota seeking a refund of $108,231, plus interest, in high-

---

[1] "Doc." references are to the docket control numbers assigned by the clerk of the district court to identify the documents comprising the original record.

[2] A pintle hook is a mechanism that can be attached to the back of a truck enabling it to pull a trailer or piece of equipment equipped with an eye within which the hook will fit.

way use taxes, for the periods from July 1, 1972, through June 30, 1978 (Pet. App. A4; Doc. 1). The district court granted summary judgment for the government on the ground that the Internal Revenue Service could properly tax petitioner's trucks as truck-trailer combinations, rather than as single units (Pet. App. A4-A8).

The court of appeals affirmed on the basis of the district court's opinion. It concluded that the Internal Revenue Service's "assessment of the vehicles as tractor-trailer combinations is consistent with the language of sections 4481 and 4482 of the Code and their corresponding regulations" (Pet. App. A3). In so holding, the court rejected petitioner's contention that the case be remanded for resolution of the "factual" issue of whether petitioner's trucks are of a type which is customarily used in connection with trailers having a gross weight of 6,000 pounds or more (Pet. App. A3).

ARGUMENT

The decision below correctly upheld the Internal Revenue Service's excise tax assessment of petitioner's trucks as truck-trailer combinations.

1. The Highway Revenue Act of 1956, Pub. L. No. 627, Title II, 70 Stat. 387 *et seq.*, increased highway user taxes, such as the taxes on the sale of diesel and special fuels and truck chassis, tires and gasoline. In addition, the Act added Section 4481(a) to the Internal Revenue Code, which imposed a new excise tax, at issue in this case, on the use of certain highway motor vehicles. Section 4481(a) states, in pertinent part, as follows (Pet. App. A8; emphasis supplied):

> A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers *customarily used* in connec-

> tion with highway motor vehicles *of the same type* as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $3.00 a year for each 1,000 pounds of taxable gross weight or fraction thereof.

Thus, the statute plainly requires taxing a truck as a truck-trailer combination as long as the large-capacity trailers, when used, are customarily towed by trucks "of the same type" as the truck at issue. The statute does not require that the particular trucks subject to tax be customarily used to tow the trailers.

This reading of Section 4481(a) is confirmed by the definitional provision of Section 4482, which defines the term "taxable gross weight," used as the measure of the tax. Section 4482(b) defines the term "taxable gross weight" (Pet. App. A9-A10) as the sum of (emphasis supplied)—

> (1) the *actual* unloaded weight of—
>
> (A) such highway motor vehicle fully equipped for service, and
>
> (B) the semitrailers and trailers * * * *customarily used* in connection with *highway motor vehicles of the same type* as such highway motor vehicles, and
>
> (2) the weight of the *maximum load customarily carried* on highway motor vehicles of *the same type as such highway motor vehicle* and on the semitrailers and trailers referred to in paragraph (1)(B).

Section 4482(b) also provides (Pet. App. A10) that:

> Taxable gross weight shall be determined under regulations prescribed by the Secretary (which regulations may include formulas or other methods for determining the taxable gross

weight of vehicles by classes, specifications, or otherwise).

Section 4482(b) thus confers upon the Commissioner the authority to promulgate regulations establishing classifications of vehicles and to assign to such classes a weight value that would apply to all vehicles in such class, without regard (1) to the actual unloaded weights of any particular vehicles of that class in actual use, (2) to the actual trailers or semitrailers used in connection with particular vehicles of that class, or (3) to the actual maximum loads of any particular vehicles or trailers or semitrailers of that class.

The Commissioner established a class of "Truck-trailer combinations" (Section 41.4482(b)-1(d)3, Treasury Regulations on Highway Motor Vehicle Use Tax (1954 Code) (26 C.F.R.)) (Pet. App. A17) and assigned weights to vehicles falling within that class according to the vehicle's actual unloaded weight, the number of axles on the vehicle, and the vehicle's towing capacity as determined from the vehicle's design characteristics (*i.e.*, whether it is "equipped for use in combinations").[3] The regula-

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[3] Section 41.4482(a)-1(b) of the regulations (Pet. App. A11) provides as follows:

§ 41.4482(a)-1 **Definition of highway motor vehicle.**

* * * * *

(b) *Treatment of certain excluded vehicles.* Although trailers and semitrailers used in combination with highway trucks or truck-tractors are not vehicles the use of which is subject to the tax imposed by section 4481(a), trailers and semitrailers customarily used in combination with highway trucks or truck-tractors are taken into account in determining the taxable gross weight of the highway motor vehicle under § 41.4482(b)-1, which is the base of the tax.

tions further provide that the type of trucks with which trailers are customarily used in combination are taxable as truck-trailer combinations.[4]

Petitioner does not dispute that its large-capacity trailers are of the kind which, when used, are customarily used in combination with the type of utility truck in question. Given the terms of the governing statute and the regulations, the decision below therefore correctly held that the Internal Revenue Service may tax petitioner's trucks as truck-trailer combinations, without making a factual showing that in actual practice the trucks are customarily used in combination with petitioner's trailers. We submit that the statutory phrase "customarily used" refers to the class of trailer which may be included in the weight computation for the vehicle. The statute, properly read, does not mandate that the trailers actually

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[4] Section 41.4482(b)-1(a) of the regulations reflects the statutory terminology found in Section 4482(b) of the Code. It states (Pet. App. A11-A12):

> § 41.4482(b)-1 **Definition of taxable gross weight.**
>
> (a) *In general.* The tax imposed on the use of a highway motor vehicle (of a taxable gross weight in excess of 26,000 pounds) is based on the taxable gross weight of such highway motor vehicle. Taxable gross weight of a highway motor vehicle is determined with reference to the sum of (1) the actual unloaded weight of such highway motor vehicle (fully equipped for service); (2) the actual unloaded weight of any one or more trailers or semitrailers (fully equipped for service) customarily used in combination with highway motor vehicle of the same type as such highway motor vehicle; and (3) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on any one or more trailers or semi-trailers [*sic*] customarily used in combination with highway motor vehicles of the same type as such highway motor vehicle.

be used with any specific taxable vehicles, but only that the trucks be of the kind that is customarily used to tow trailers. See Section 4482(b)(1)(B) of the Code. Accordingly, if a truck such as petitioner's, is equipped with a heavy-duty pintle hook that enables it to tow a trailer of a prescribed weight, that is the kind that is customarily used in connection with highway motor vehicles of the same type, and properly taxed as a "truck-trailer" combination under Section 4481. There is accordingly no basis for petitioner's claim for an evidentiary hearing to determine the actual use of its trailers.[5]

2. Petitioner further argues (Pet. 8) that the reliance by the lower courts upon " 'the discretion given to the Secretary in § 4482 to determine vehicles' gross weights by employing specifications or classes' " cannot be squared with the statutory language specifying the vehicular weight at which the highway use tax would commence and the loads which could be used in determining vehicular weight. But the classifications in the schedule embodied in the regulations are fully consistent with the Service's statutory authority in Section 4482(b) to determine taxable gross weights by "classes, specifications, or otherwise." Indeed, the Service's classifications are fully consistent with the principle that legislative regulations, such as those in the instant case,

[5] Moreover, Section 4482 accords broad discretion to the Commissioner to determine the gross weights of vehicles by employing specifications or classes. The Commissioner's classification of "equipped for use in combinations" is only one aspect of the three-part determination of taxable gross weight required by Section 4482(b). Thus, whether a truck is capable of pulling trailers or semitrailers, the actual unloaded weights and loads of which are increments of the truck's taxable gross weight under Section 4482(b)(1)(B) and (2), will determine whether it is used in combination.

must be given special deference. *Commissioner* v. *Portland Cement Co. of Utah*, 450 U.S. 156 (1981).

The statute defines "taxable gross weight" as the actual unloaded weight of the truck, the trailers and semitrailers customarily used with the type of truck in issue, and the weight of the maximum load customarily carried on trucks, trailers, and semitrailers of that type. However, Congress expressly left the implementation of the definition of "taxable gross weight" to the Internal Revenue Service. The use tax schedules in the regulations provide a broad classification of trucks based upon unloaded weights and number of axles, and whether the trucks are of the type that can tow heavy duty trailers. Thus, in establishing the class of trucks "equipped for use in combinations," the Commissioner accordingly acted within his statutory authority. Since the type of truck so equipped is customarily used to haul the kind of trailer owned by petitioner, the decision below correctly determined that no factual inquiry as to actual use of petitioner's trucks was necessary.

3. Finally, petitioner argues (Pet. 7-8) that the decision below conflicts with *Pacific Gas & Electric Co.* v. *United States*, 664 F.2d 1133 (9th Cir. 1981), petition for rehearing pending, No. 80-4132. There, shortly after the decision below was rendered, the Ninth Circuit held in a comparable case that the Service could not classify a vehicle as a "truck-trailer" combination on the ground that it was equipped with a pintle hook enabling it to tow a trailer of a prescribed weight, "without first determining that such trailer or semitrailer is the type customarily used in combination with such vehicle" (*id.* at 1136). Hence, the court remanded the case "for a factual determination as to whether trailers and/or semitrailers are customarily used in connection with highway motor

vehicles of the same type operated by [the taxpayer]" (*ibid.*).

We do not deny that the decision below and *Pacific Gas & Electric Co.* reach opposite results on comparable facts. Moreover, we believe the Ninth Circuit erroneously circumscribed the authority of the Commissioner to classify vehicles as truck-trailer combinations on the basis of their type and equipment. But although the decision below was called to the Ninth Circuit's attention, both after oral argument and by way of a petition for rehearing which is still pending, that court has not yet explicitly disagreed with the precedent established by the decision in this case. And since the decision below was rendered before *Pacific Gas & Electric Co.*, the Eighth Circuit has not had an opportunity to address the contrary precedent of the Ninth Circuit.[6]

To be sure, a conflict of decisions need not be explicitly acknowledged by the courts of appeals to warrant resolution by this Court. Moreover, the amount of revenue at stake on this issue is not insubstantial. The Internal Revenue Service advises us that there are presently pending administratively 262 cases with $6.4 million presenting the question in this case. Despite the conflict of decisions and foregoing revenue statistics, we nevertheless believe that this case does not justify review by the Court. To begin with, the question presented under the excise tax statutes is extremely narrow in scope and technical in nature, and seems best resolved by more explicit regulations or administrative guidelines elaborating upon the statutory phrase "customarily used in combination with highway motor vehicles of the

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[6] The court below did, however, cite with approval the district court's decision in *Pacific Gas & Electric Co.*, which was reversed by the Ninth Circuit (see Pet. App. A-5).

same type * * *" (Pet. App. A-10), rather than by a decision of this Court. Moreover, the fact that neither the court below nor the Ninth Circuit have squarely faced the question of the correctness of each other's decision suggests that the conflict may prove to be of limited duration. In these circumstances, we believe that the question whether the particular trucks at issue here are taxable as truck-trailer combinations is not worthy of review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 371342 861

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
APR 28 1982
ALEXANDER L. STEVAS,
CLERK

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PETITIONER'S REPLY BRIEF

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224-7631 — Review Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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PETITIONER'S REPLY BRIEF

This reply brief addresses two points raised in the respondent's brief in opposition which require clarification:

I. In its statement of the question presented, respondent indicates that the issue of taxation turns upon whether petitioner's *trucks* were of the type which is customarily used to tow a trailer. We agree. However, in subsequently articulating its position, respondent shifts the focus of the "cus-

tomarily used" standard from the type of truck to the type of *trailer* by suggesting that "the statutory phrase 'customarily used' refers to the class of trailer which may be included in the weight computation for the vehicle" (Br. in Opp., p. 6). Respondent would therefore read Sections 4481 and 4482 of the Code as treating a truck as a truck-trailer combination if it towed trailers which are of a type which, when towed, are customarily used with trucks.

We believe, however, that such contention ignores the plain meaning of the statutes which, in the first instance, impose the highway use tax only in accordance with the taxable gross weight of the truck. The assumed weight of a trailer will, however, be added to that of the truck if trucks of the type in question customarily tow such trailers. This construction of the highway use tax law is consistent with the purpose of taxing vehicles in accordance with the physical burden which they place upon the roadways. It is further consistent with respondent's formulation of the law in Rev. Rul. 76-294, 1976-2 C.B. 364 (Pet. App. A-20), which states that a truck is classified as a truck-trailer combination only "if trucks of the same type, when so equipped, are customarily used to tow such trailers or semitrailers."

The instant case therefore affords this Court the opportunity to clarify whatever ambiguity may exist in the meaning of the statutory phrase "customarily used".

II. The respondent submits that:

> . . . the question presented under the excise tax statutes is extremely narrow in scope and technical in nature, and seems best resolved by more explicit regulations or administrative guidelines elaborating upon the statutory phrase 'customarily used in combination with highway motor vehicles of the same type . . . ,' rather than by a decision of this Court. (Br. in Opp., pp. 9-10).

However, "more explicit regulations or administrative guidelines" would do nothing to resolve the instant litigation or the disputes presently involving the 262 other taxpayers whose claims for refund, involving approximately $6.4 million, have been placed in administrative suspense to await resolution of the cases now pending before the courts. Meanwhile, those taxpayers situated within the Ninth Circuit will have their disputes litigated as questions of fact, while the petitioner and all other taxpayers situated within the Eighth Circuit will have their complaints dismissed as a matter of law. All other taxpayers will face government motions for summary judgment, and the courts involved will have to choose between the conflicting authorities which presently exist.

The issues raised merit this Court's consideration and determination.

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